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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1661

BEVERAGE DISTRIBUTORS, INC., a corporation,

Petitioner,

vs.

OLYMPIA BREWING CO., a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BEVERAGE DISTRIBUTORS, INC., a corporation,

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Beverage Distributors, Inc., ("BDI" herein) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause, on March 1, 1971, in favor of defendant Olympia Brewing Co. ("Olympia" herein).

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is printed as Appendix B, hereto. The opinion of the

United States District Court for the Northern District of California denying motion for judgment notwithstanding the verdict is also not officially reported. It is also included in Appendix B hereto.

JURISDICTIONAL GROUNDS

Petitioner seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit entered March 1, 1971, affirming judgment of the United States District Court which had denied plaintiff's motion for judgment notwithstanding the verdict for defendant. Petition for rehearing and suggestion for hearing in banc was denied by the Court of Appeals on April 6, 1971. Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is based upon 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a violation of Section 1 of the Sherman Act is established by a brewer's territorial and customer restrictions on a distributor where there is undisputed and conclusive evidence overlooked or disregarded by the Courts, that the brewer—with knowledge of the distributor's "fears that its only source of supply might be disrupted" by competing for new customers—formally notified the distributor that such brewer has an "obligation" to its other distributors to prevent "encroachment" by such distributor in their "franchise territories".

2. Whether a violation of Section 1 of the Sherman Act is established by a brewer's imposition of high fair traded prices on a low-price warehouse beer distributor, in response to the distributor's announcement of intention to comply with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), by competing for new customers; the fair trade contracts are acknowledged by the brewer and the Court of Appeals to have been designed "to deter proliferation of warehouse distribution" to additional "chain outlets".

3. Whether violation of Section 1 of the Sherman Act was established by such brewer's refusal to deal at any price when such distributor succeeded in making sales at the high fair trade prices to new customers and brought this suit.

STATUTES INVOLVED

See Appendix A.

STATEMENT OF THE CASE

Olympia Brewing Co. manufactures Olympia beer, which is the second largest selling beer in California (Exhibit EE). Olympia beer is sold to retailers in California by a number of distributors appointed by Olympia. With the exception of BDI, all Olympia distributors in California have well-defined geographical territories (R.T., page 802, Exhibits 2a, 3a). With the exception of isolated instances, other Olympia distributors have sold only to retailers located within their territories (R.T., page 802). Boundary or customer disputes regularly have been settled between distributors at the direction of Olympia (R.T., pages 803, 804, 1034-1037).

BDI sells Olympia beer as well as other brands (R.T., page 276). BDI sells at substantially lower prices than other distributors, generally for delivery to customers' central warehouses (R.T., pages 282, 285, 475, Exhibit 97). BDI is the only wholesaler who sold below Olympia's suggested minimum prices.

Prior to 1967, BDI only sold Olympia beer to Safeway Stores, although it sold other brands to other customers. Olympia's president testified that since he had been president he had understood that the arrangement between BDI and Olympia was that BDI would only sell Olympia beer to Safeway (R.T., page 103). This arrangement commenced with an exchange of letters between BDI and Olympia in 1958 (Exhibits 51, 52). Prior to that time BDI had been a wholly-owned subsidiary of Safeway and had sold all products only to Safeway. In 1958, new owners acquired

the BDI stock (R.T., page 286), and BDI commenced selling beer to customers in addition to Safeway (R.T., page 289). Immediately the president of Olympia and a number of other brewers met in San Francisco. At this meeting BDI's efforts were denounced by the president of the California Brewers Association as a "threat to our distribution system" (R.T., pages 731-732, 733-736, 737-738). Following this meeting Olympia notified BDI that Olympia would make no further shipments to BDI "until the situation clarified" (Exhibit 4, R.T., pages 310-313). At the same time, BDI suddenly found itself unable to get delivery of most other major brands of beer (R.T., pages 343-345). BDI then wrote to Olympia, offering an assurance that BDI would not sell Olympia beer to anyone but Safeway, without further permission from Olympia (Exhibit 51). Similar letters were sent to other brewers (Exhibits 53, 55, 57). After receipt of BDI's letter, Olympia resumed shipments to BDI, and replied with a letter making clear that the customer restriction to Safeway constituted a condition required by Olympia (R.T., page 346, Exhibit 52):

> ". . . we would at the present time desire to hold yourself to your indicated commitment not to sell our product to anyone but Safeway. If you should desire to effect sales to others than Safeway, please immediately contact us so that we may review the whole situation." (Exhibit 52, letter, July 28, 1958, Olympia to BDI.)

From the time of these arrangements until August 1967, BDI sold Olympia beer only to Safeway, although it sold other brands to its other customers.

In 1965, Olympia admitted that it knew that BDI feared the loss of its source of supply if BDI were to attempt to make sales of Olympia products to other customers (Exhibit 100). Olympia further admitted that if it were to have accepted orders for sales by BDI to other customers, Olympia would have undercut an

obligation it had assumed to protect franchise territories of other distributors from "encroachment". These admissions, contained in a brief filed by Olympia's attorneys in a suit against both Olympia and BDI by a retailer, Thriftimart, stated:

> "Olympia . . . grants separate territorial franchises to a series of independent distributors. . . . a distributor who does his job well should have his franchise protected from unfair encroachment.
>
> "To this setting comes Thriftimart with the demand in substance that the brewers be ordered to sell through BDI to Thriftimart on *Thriftimart* terms. The effect of Thriftimart's demand on Olympia is as follows:
>
> . . .
>
> "(2) Olympia will be required to accept sales made within franchise territories by other than the territorial distributors, thereby undercutting Olympia's obligation to its territorial franchises. . . .
>
> . . .
>
> "(3) CONCLUSION
>
> . . .
>
> (2) BDI, the envisioned supplier, fears that its only source of supply will be distrupted if it must sell to Thriftimart." (Exhibit 100, Memorandum dated and served September 23, 1965, by Olympia's attorneys on BDI's attorneys.)

In July 1966, during the pendency of the Thriftimart suit just referred to, Olympia's attorneys advised an Olympia officer that if Thriftimart "tries to put him on the spot by asking him to arrange for BDI to sell them", he should respond that BDI has a free choice of customers with which Olympia does not interfere (Exhibit 112, relied on in the Court's Opinion, Appendix B, page 21, as establishing that beginning September, 1963, there was "no restraint upon BDI" and that "if any restraint was felt it was self imposed"). The Court ignores the fact that this information was first communicated to BDI in August 1967 and until then the 1958 restriction on BDI as clarified by Olympia's

formal notice of September 1965, remained unchanged. Thus, until August 1967, Olympia did nothing to change BDI's "fears" and understanding that "its only source of supply will be disrupted" if it sells to Thriftimart, and Olympia continued in effect its warning and restriction on BDI not to "encroach."

On August 7, 1967, following this Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967), BDI notified Olympia that BDI intended to compete for the sale of Olympia beer to customers in addition to Safeway (Exhibit 12). Immediately upon receipt of BDI's announcement, Olympia advised BDI that BDI was subject to no customer restrictions but that its prices would immediately be subject to a wholesale fair trade program in California (R.T. pages 179-184). Two wholesalers had readily agreed to sign fair trade contracts with Olympia fixing wholesale prices (R.T., 1069-1092). Since BDI was the only distributor selling below Olympia's suggested prices, the fair trade program affected only BDI's prices (R.T., page 1074). Olympia's president admitted at trial that Olympia's purpose in entering into the fair trade program was to restrict BDI from selling to customers other than Safeway:

> "Q. But your purpose was to have a deterrent action on the ability of B.D.I. to sell to customers other than Safeway?
> "A. All right, I'll buy that." (R.T. p. 191).

Olympia admitted that it had no plans in mind to fair trade its wholesale price until BDI announced that it intended to sell Olympia beer to other customers (R.T., page 1065-1066).

BDI filed this suit on August 31, 1967 asserting that Olympia's fair trade program was adopted in violation of the Sherman Act.

For some two weeks after the effective date of Olympia's fair trade program, no orders were received from BDI, and the Olympia executives thought that the fair trade program had been successful in eliminating BDI's competition (R.T., pages 247-248). Then finally on September 7, 1967, some orders came through from

BDI, and the Olympia executives immediately held another meeting to determine whether "to ship or not to ship" (R.T., 786-787). The Olympia executives were worried that the new BDI orders were for shipment to customers of BDI other than Safeway (R.T., page 254). The meeting was short, and the decision was made to terminate BDI. Olympia claims that the reason for termination of BDI was that it had lost confidence in BDI for having filed this antitrust suit (Olympia Brief before Court of Appeals, page 34). The termination of BDI had, however, been recommended to Olympia's president by Olympia's director of sales at the meeting a month previous when BDI had first announced its program of competition for new customers (R.T., page 184). At the previous meeting when Olympia's president decided to adopt a fair trade program for the wholesale price, he also determined to "wait and see what happens . . . whether we would get orders or whether we wouldn't get orders . . . ." (R.T., page 196).

Jurisdiction in the United States District Court was invoked under 15 U.S.C. sections 1, 15 and 26, and 28 U.S.C. section 1337.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I

A violation of Section 1 of the Sherman Act is established by Olympia's territorial and customer restrictions on BDI, particularly since there is undisputed and conclusive evidence overlooked or disregarded by the Courts, that in 1965 Olympia, with knowledge of BDI's "fears that its only source of supply might be disrupted" by competing for new customers, formally notified BDI that Olympia had an "obligation" to its other distributors to prevent "encroachment" by BDI in their "franchise territories".

The opinion of the Court of Appeals, although properly giving all intendments to the evidence in order to support the defense verdict, has misapplied the clear standard set forth by this Court

for determination whether or not admitted conduct of Olympia constitutes a contract, combination or conspiracy forbidden by the Sherman Act.

The Court first found that the exchange of letters establishing a customer restriction upon BDI (Exhibits 51 and 52) did not constitute a contract because by the exchange of letters BDI "does not offer to buy in any amount for any price or for any length of time." (Appendix B, page 16). Further, the Court states that the exchange did not "foreclose different arrangements" in the future (*id.*, page 17). The Court concludes that the contract was illusory, "judged by the standards of contract law" (*id.*, page 19). We submit that the tests taken from the law of contracts which the Court has discussed for the determination of the existence of a restraint of trade should be completely inapplicable to the determination of the scope of the Sherman Act as a charter of free competition. Furthermore, whether or not the exchange of letters standing alone could constitute a basis for specific performance, they constituted a contractual background which underlay each sales transaction between BDI and Olympia. *St. Paul Fire & Marine Ins. Co. v. Tennefos Construction Co.*, 396 F.2d 623, 628-629 (8th Cir. 1968); *Restatement of Contracts*, Sections 30, 32 (Comment c); *cf. J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-335, 64 S.Ct. 576, 579, 88 L.Ed. 762 (1944). Even the case relied upon by the Court for the proposition that the exchange of letters was illusory holds that subsequent arrangements between the parties establishing specific requirements could and did make the contract definite under the law of contracts. *Eastern Transportation Co. v. Blue Ridge Coal Corp.*, 159 F.2d 642, 643 (2d Cir. 1947).

The Court then proceeded to find that any customer restraint upon BDI prior to 1967 was "self imposed" (Appendix B, page 21), and therefore not a combination forbidden by the Sherman Act. The Court held that because of the use of

precatory words ("we would desire" rather than "we insist", "we must require" or "we demand") that the exchange of letters between the parties did not set forth a combination illegal under *Albrecht v. Herald Company,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed. 2d 998 (1968) (Appendix B, page 20). The Court has totally ignored Olympia's formal notice in 1965 (Exhibit 100) that Olympia had an obligation to protect the "territorial franchises" of other distributors from "encroachment" by BDI and that Olympia knew that BDI feared the loss of its source of supply if it should attempt to sell Olympia beer to other customers (Exhibit 100).

We submit that such a blind reliance upon form of wording even in attempting to find support for a jury verdict would make it simple for pettifoggers to avoid the impact of the Sherman Act prohibition against restraint of trade. We are confident, however, that this Court's long-established doctrine does not require such strained construction of the facts to support a judgment for defendant as to permit a manufacturer to so easily evade the mandate of the Act. *Albrecht v. Herald Company,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *United States v. Parke, Davis and Company,* 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960).

In *Albrecht v. Herald Company,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), *supra,* this Court reversed a judgment for defendant based, like Olympia's, upon a jury verdict for defendant. The Court held that, despite the verdict, the undisputed facts established liability for restraint of trade because the defendant's conduct could not "be deemed wholly unilateral" (390 U.S. at 149, 88 S.Ct. at 871), and "that a combination in restraint of trade existed." (390 U.S. at 154, 88 S.Ct. at 874).

II

A violation of Section 1 of the Sherman Act is established by Olympia's imposition of high fair traded prices on BDI in

response to BDI's announcement of intention to comply with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), by competing for new customers; the fair trade contracts are acknowledged by Olympia and the Court of Appeals to be designed "to deter proliferation of warehouse distribution" to such additional "chain outlets".

The Court of Appeals has repeated the basic proposition that fair trade agreements may not be used to accomplish purposes otherwise illegal under the antitrust laws (Appendix B, page 22). *United States v. Frankfort Distilleries*, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945); *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). Yet the Court has held that the jury verdict was supported by substantial evidence (Appendix B, page 23), while in the same breath referring to the admission of Olympia's executives that the fair trade program was instituted "to deter the proliferation of warehouse distribution" (*id.*, at 22).

Apparently in justification of Olympia's decision to solicit fair trade contracts from other distributors, the Court refers to Olympia's "concern" that warehouse distribution to chain outlets, *i.e.*, customers in addition to Safeway, "resulted in loss of quality control" (*id.*, at 21). We submit that under the controlling decisions of this Court, such a per se restriction upon competition as the contract between Olympia and two other distributors to "deter" a method of conducting business cannot be excused as justified by sound economic or business reasons. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374, 87 S.Ct. 1856, 1863, 18 L.Ed.2d 1246 (1967) (customer restrictions to permit small independent merchants to compete more effectively against mass merchandisers illegal); *United States v. General Motors Corp.*, 384 U.S. 127, 142, 86 S.Ct. 1321, 1369, 16 L.Ed.2d 415 (1966) (customer restrictions to combat discount houses illegal); *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457,

467, 61 S.Ct. 703, 708, 85 L.Ed. 949 (1941) (customer restrictions to protect against style pirates illegal). Olympia's purpose to deter warehouse distribution constitutes no better justification.

III

A violation of Section 1 of the Sherman Act is established by Olympia's refusal to deal at any price when BDI succeeded in making sales at the high fair trade prices to new customers and brought this suit.

Olympia's top executives have admitted that their basic reason for terminating BDI was that despite the imposition of high fair trade prices, BDI nevertheless had been able to secure some new customers (*supra*, page 7). On that basis the termination is invalid for the same reasons that the fair trade program is invalid (*supra*, page 9).

Yet the termination was illegal even if one is to accept the statement that Olympia terminated BDI for loss of confidence resulting from the filing of this suit under the antitrust laws. Prior to *Albrecht v. Herald Company*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), there were two conflicting lines of authority in the circuits on the question of whether or not the right to choose his customers allowed a manufacturer to terminate a distributor for filing suit against the manufacturer under the antitrust laws. In *Bergen Drug Company v. Parke, Davis & Company*, 307 F.2d 725 (3rd Cir. 1962), the Court held that the right to choose customers did not permit a defendant to stifle a suit under the antitrust laws. This holding was followed in *F. K. Weingartner v. Union Oil Co. of California*, 1966 Trade Cases par. 71,757 (N.D.Cal. No. 43514, 1965). *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962), had held to the contrary. In reliance upon *Simplicity Pattern*, the Court of Appeals for the Eighth Circuit held in *Albrecht v. Herald Company*, 367 F.2d 517, 523 (8th Cir. 1966), that the

defendant had a legal right to terminate plaintiff for filing an antitrust suit against it. This Court, however, reversed as a matter of law, noting, without further comment, that the plaintiff had been terminated "in response" to the filing of the antitrust suit (390 U.S. at 148, 88 S.Ct. at 871). In our case the Court of Appeals remarked that it failed to "find the same comfort in *Albrecht* for BDI's position on these facts that it does" (Appendix B, page 24). We urge that the reasoning in *Bergen* (*supra,* page 11), should be set forth as the reasoning of this Court, so as to establish a guarantee for the distributor who might otherwise fear to assert his rights under the antitrust law.

CONCLUSION

The ruling of the Court of Appeals reflects a grave failure to follow the applicable decisions of this Court, allows injustice to be done to petitioner in its sincere effort to comply with this Court's decision in *Schwinn,* and opens a gap in the enforcement of the antitrust laws which can be exploited against distributors who attempt good faith efforts to compete with each other throughout the United States. This petition for a writ of certiorari should be granted.

Dated: April 12, 1971.

Respectfully submitted,

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Appendix A

United States Code, Title 15

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and

eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

California Business and Professions Code, Sections 24200, 24749, 24750, 24752, 25617, 25618

24200. Grounds. The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution.

(b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 of Division 2 of the Revenue and Taxation Code or any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

(c) The misrepresentation of a material fact by any applicant in obtaining any license.

24749. Policy. It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.

24750. Contracts lawful. No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others violates any law of this State by reason of either of the following provisions which may be contained in such contract:

(a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor.

(b) That the producer or vendee of the alcoholic beverage require upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee.

24752. Selling below fair trade price. Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter, or in any effective minimum retail price schedule filed with the department pursuant to Section 24755, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.

25617. Punishment for misdemeanor. Every person convicted for a violation of any of the provisions of this division for which another penalty or punishment is not specifically provided for in this ground are not a limitation upon the department's authority to a fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

25618. Punishment for felony. Every person convicted of a felony for violation of any of the provisions of this division for which another punishment is not specifically provided for in this division shall be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment in the state penitentiary for not less than one year nor more than five years, or by both such fine and imprisonment.

Appendix B

United States District Court
Northern District of California

No. 47759

BEVERAGE DISTRIBUTORS, INC., a corporation,
Plaintiff,

vs.

OLYMPIA BREWING CO., a corporation,
Defendant.

MEMORANDUM OF DECISION AND JUDGMENT

The issues in this case, involving conflicting testimony and evidence susceptible of different inferences concerning the central issue of combination and conspiracy vis a vis independent action, having been fully and fairly presented to a jury, as demanded by plaintiff, and the jury having by its general verdict resolved said and all other issues against plaintiff and, it appearing to the court that said verdict is not so inadequately supported by the evidence as to require a new trial.

IT IS ORDERED that plaintiff's motion for judgment notwithstanding the verdict or alternatively for a new trial, is denied and, further,

ORDERED that the court, adopting the verdict of the jury, denies plaintiff's application for a permanent injunction and enters judgment accordingly in favor of defendant and against plaintiff on equitable issues herein and, further,

ORDERED that the preliminary injunction now in effect be dissolved upon expiration of fifteen (15) days from this order unless plaintiff files its notice of appeal from judgment herein in which case said preliminary injunction will remain in effect pending appeal or the further order of this court or the Court of Appeals.

Dated: December 22, 1969.

W. T. SWEIGERT
United States District Judge

United States Court of Appeals
for the Ninth Circuit

No. 25,463

BEVERAGE DISTRIBUTORS, INC., a corporation,
Plaintiff-Appellant,

vs.

OLYMPIA BREWING CO., a corporation,
Defendant-Appellee.

[March 1, 1971]

On Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, WRIGHT and TRASK, Circuit Judges.

TRASK, Circuit Judge:

This is an action by Beverage Distributors, Inc. to recover treble damages from Olympia Brewing Company under Section 4 of the Clayton Act, 15 U.S.C. § 15, for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and for injunctive relief. 15 U.S.C. § 26. Jurisdiction is also invoked under 28 U.S.C. § 1337. (General jurisdiction of district courts over trade restraints and monopolies).

FACTS and CONTENTIONS

Olympia Brewing Company (Olympia) with its principal brewery in Tumwater, Washington, is a brewer of various beer products. It has been in business on the west coast and elsewhere for many years marketing its brew to the public through sales to distributors who buy in quantity and at a wholesale price. The distributor or wholesaler, markets his beer to the retailer who sells to the consumer. Olympia in 1969 was the second largest selling beer in California and in 1960 was the fourth largest. Beverage Distributors, Inc. (B.D.I.), is a licensed beer wholesaler distributing beer, among other products, in California, Nevada and Arizona.

At the time B.D.I. began distributing Olympia products, B.D.I. was a wholly-owned subsidiary of Safeway Stores, Inc., and was the only entree which a brewer had to place its products with Safeway's stores as a retail outlet. Safeway did not purchase any beer for its stores other than through B.D.I. and B.D.I. did not sell any beer except to Safeway. B.D.I. also sold other brands of beer to Safeway in the same manner.

On June 28, 1953, Olympia appointed B.D.I. a distributor for its beer. Exs. S; T. The letter of appointment contains no restrictions on the territory to be served by B.D.I. or on the customers to whom B.D.I. could distribute Olympia beer. It described the relationship as one necessarily based upon mutual trust and confidence, and contains no provision for any definite term.[1]

Other distributors were also appointed by Olympia from time to time. They were principally those already in the beer business and, when appointed, their appointment outlined the areas they were then serving and they were expected by Olympia to properly service every account in their own area. As distribution expanded, territories over which Olympia distributors assumed responsibility to provide full service tended to be non-overlapping. Full service required by Olympia included the duty of the distributor to have

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1. Exhibit S refers to a policy statement of 1896 by the founder of the Olympia Brewing Company which was "enclosed." The enclosure was not found among the exhibits. A restatement of at least a portion of this policy was contained in Ex. U, dated June 21, 1960, from Adolph Schmidt, Jr., President of Olympia, to A. D. Morton, president of B.D.I. Among other statements of Olympia policy was the following:

> "As has been explained to you, at no time do we consider there is any value attached to a distributorship of Olympia Beer. In other words, you have purchased nothing nor, should we ever find it necessary to make a change, have you anything to sell."

Mr. Morton acknowledged receipt of this letter on June 24, 1960, Ex. V, saying:

> "We still have in our files your letter of June 2, 1953, welcoming us as Olympia distributors in California and outlining your policies.
>
> "We are happy to be a member of the Olympia family, and compliment you on the high level of your business principles which go hand in hand with the outstanding quality of Olympia Beer."

every type of Olympia package on the retailer's shelves, to support Olympia merchandising programs, to make deliveries promptly and regularly, to rotate beer and generally to promote the brewer's sales techniques and to protect the quality of the product.

Sometime in early 1958 a group of B.D.I. employees purchased the entire capital stock of that company from Safeway. There was testimony that in June of that year B.D.I. began selling beer to customers other than Safeway. As a result of the change in ownership and in policy, a number of brewers such as Hamm, Budweiser, Bergermeister, Falstaff and Schlitz ceased making deliveries of beer to B.D.I. B.D.I. contends that this constituted a boycott in which Olympia participated with other brewers and that it caused B.D.I. to enter into a written agreement with Olympia in July 1958 in which B.D.I. agreed that it would bow to the territorial and customer restrictions which Olympia imposed upon it.[2] B.D.I. contended these restrictions prevented it from competing for retailer customers in territories allocated to other Olympia distributors who sold at higher prices. This boycott, with its claimed continuing effect, constituted the first alleged violation of the Sherman Act. Brief for appellee at 12.

The second asserted violation of Section 1 of the Sherman Act is alleged to have occurred in 1967. In June of that year the Supreme Court decided *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). As a result of the pronouncements contained in that decision on August 7, B.D.I. notified Olympia that B.D.I. intended to compete with other Olympia distributors for the sale of

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2. The principal criticism of B.D.I. expressed by a brewery official at a July 2, 1958, meeting leading up to the boycott was that of Mr. Picard, an official of Burgermeister Brewing Company. Subsequently, and prior to July 11, 1958, (when B.D.I. asserted it was coerced into an agreement with Olympia containing territorial and customer restrictions by the same boycott) B.D.I. and Safeway as plaintiffs filed a complaint in the Federal Court at San Francisco against "certain brewers and others under the federal anti-trust laws," which included Burgermeister. Although B.D.I. now complains that Olympia participated in that illegal boycott it did not then join Olympia as a party defendant to that suit.

Olympia beer to retailers other than Safeway. In September of 1967, Olympia adopted and put in operation a fair trade program, lawful in California, the effect of which was to prevent B.D.I. from selling below Olympia's "suggested" prices. The adoption of this fair trade program is the second alleged violation of Section 1. Thereafter B.D.I. continued to make sales of Olympia beer to retailers other than Safeway at fair trade prices. When further orders came to Olympia Brewing Company from B.D.I., Olympia refused to fill them. B.D.I. had filed this action in the meantime and the Olympia executives stated, as their reason for Olympia's refusal to deal, that they could not do business with someone in whom they no longer had confidence and who had lost confidence in them. This refusal to deal constituted the third alleged violation of the Sherman Act.

This action was filed on August 30, 1967, seeking treble-damages for violations of Section 1 as well as injunctive relief against the refusal to deal. A preliminary injunction enjoining Olympia from refusing to sell to B.D.I. is still in effect.[3] The action came on for trial and a lengthy jury trial was held. The reporter's transcript contains over 2,500 pages with 210 exhibits for the plaintiff and 48 for the defendant. At the conclusion, the issues were submitted to the jury under a form of general verdict covering liability as well as damages. Most of the factual issues were in sharp disagreement. The plaintiff made no objection to the instructions given but asserts error in two refused instructions. The plaintiff also complains of the introduction of certain evidence. The jury having been instructed upon both liability and damages found for the defendant. The trial court considered a motion for judgment notwithstanding the verdict and in the alternative for a new trial and denied both.[4] We affirm.

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3. This court's opinion modifying the injunction is reported in 395 F.2d 850 (1968).

4. "The issues in this case, involving conflicting testimony and evidence susceptible of different inferences concerning the central

EFFECT OF THE VERDICT OF THE JURY

When a jury verdict has been returned and it has been considered by the trial judge in the light of a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the scope of appellate review is strictly limited. It then becomes our duty to affirm if all of the evidence together with favorable inferences therefrom reasonably supports the determination of fact made by the jury, and the judgment of the court rendered thereon. *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944); *Insurance Co. of North America v. Thompson*, 381 F.2d 677, 681 (9th Cir. 1967); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Produce Co.*, 284 F.2d 1, 17-18 (9th Cir. 1960), *modified*, 289 F.2d 933, *reversed on other grounds*, 370 U.S. 19 (1962); *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 712 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962). In this posture of the case we are required to view the evidence in a manner most favorable to the prevailing party. As appellant correctly points out, however, these familiar rules of construction do not entirely foreclo appellant's rights even on factual matters, for if the undisputed facts clearly disclose that the appellee was not entitled to succeed, this court should not and would not hesitate to set aside the judgment. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

Likewise, if the verdict of the jury or the judgment of the district court that Olympia did not violate the Sherman Act, was premised on an erroneous legal standard to be applied, the verdict and judgment could not stand. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In this instance we do not believe the verdict and judgment contain either frailty.

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issue of combination and conspiracy vis a vis independent action, having been fully and fairly presented to a jury, as demanded by plaintiff, and the jury having by its general verdict resolved said and all other issues against plaintiff and, it appearing to the court that said verdict is not so inadequately supported by the evidence as to require a new trial. . . ." C.T. 618.

THE TERRITORIAL and CUSTOMER RESTRICTION CLAIM

B.D.I. relies first of all upon activity of Olympia which it asserts amounts to an unlawful restriction upon the right of B.D.I. to compete with other distributors of Olympia beer in territories which the latter serve. This, it contends, is a per se violation of Section 1. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The activity of Olympia relied upon by B.D.I. consists of Olympia's participation in an alleged boycott of B.D.I. by a number of national brewers calculated to force B.D.I. to observe territorial and customer restrictions, and an exchange of correspondence which B.D.I. asserts constituted an agreement forced on B.D.I. by Olympia to observe such restrictions. Both events occurred in 1958, but with effects asserted to continue until 1967.

With respect to the asserted boycott, it appears that in June 1958 a group of B.D.I. employees purchased all of the capital stock of B.D.I. from Safeway Stores, Inc., the prior owner. Before that date there had been no effort by Safeway to use its wholly-owned subsidiary, B.D.I., for any purpose other than to service its own stores. Upon separation of B.D.I. and Safeway, B.D.I. began selling beer to customers other than Safeway, although none of Olympia's products were so sold. Shortly after this there was a California Brewers Association meeting in San Francisco. Most of the major breweries had representatives in attendance. Olympia was only an associate member but its President, Mr. Schmidt, was present at the association meeting. It was at this meeting that Mr. Picard, President of Burgermeister Brewery, related to some of the officials of other breweries the changed plan of B.D.I. to distribute beer products and expressed Burgermeister's considerable concern over the change. There was no concert of action proposed or entered into nor did Mr. Schmidt make any comment or offer any suggestion. There were later meetings including one at Mr. Picard's office, but Mr. Schmidt did not attend. Some of the major breweries halted shipments to B.D.I. at about this date or a little later. B.D.I. introduced evidence to the effect that Olympia's sales manager notified B.D.I. that Olympia would make no further ship-

ments to B.D.I. until he had an opportunity to discuss basic policy with his principals who were not available at this time. Ex. 41, R.T. 310-13.[5] Phillip Hannah, Sales Manager of Olympia, testified that he was not aware that any other breweries had stopped making shipments to B.D.I. in July of 1958. R.T. 1243-45.

This brings us to the second item of evidence upon which B.D.I. relies to establish a per se territorial and customer restriction. This consists of an exchange of letters beginning with a letter of B.D.I. to Olympia under date of July 11, 1958, Ex. 51, and a response thereto from Olympia dated July 28, 1958. Ex. 52. The letter from B.D.I. was unsolicited and enclosed a "courtesy copy" of an antitrust complaint filed by B.D.I. and Safeway against certain breweries and others. It explained some of the B.D.I. problems and contained these two paragraphs:

> "Some brewers have recently expressed fear that we might sell their product, without their consent, to retailers other than Safeway. You may rest assured that we shall not sell your products to anyone other than Safeway without your prior consent and approval.
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> "Circumstances change, of course, and if opportunities for a broader form of distribution should arise, we would like to feel free to discuss them with you."[6]

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5. B.D.I. leans heavily for support of its boycott theory and its restriction argument on a B.D.I. memorandum of a telephone conversation which occurred on July 3, 1958, when Art Halgren of Olympia called A. D. Morton of B.D.I. and stated he was not going to fill existing orders for Olympia products "until he had an opportunity to discuss basic policy with his principals." This memo stated that B.D.I.'s Morton affirmed that it had not sold any Olympia to others "and had no intention of doing so." When asked by Halgren if this was a temporary policy, Morton said, "that as far as we knew now it was our policy for the foreseeable future," and that if the policy changed "we would discuss it with the brand owner involved." Neither Halgren or Morton testified at the trial but Hannah, Ass't. Sales Mgr. at the time, testified that he had not talked to Morton on this subject and knew of no one else in Olympia who had done so. R.T. 1301. Thus we are entitled to assume that there was an evidentiary conflict on this fact question and that it was resloved against B.D.I. The contention that this conversation is a matter of uncontroverted evidence cannot be supported.

6. An exact duplicate of this letter was sent to Schlitz Brewing Co., Hamms Brewing Co. and Anheuser-Busch Brewing Co.

On July 28, 1958, Mr. Halgren, Sales Manager of Olympia, replied, thanking B.D.I. for the "courtesy copy" of the antitrust complaint against others but stating he did not understand it and hence passed it to the company attorneys. He continued:

> "In regard to the third and fourth paragraphs of your letter, we would at the present time desire to hold yourself [sic] to your indicated commitment not to sell our product to anyone but Safeway. If you should desire to effect sales to others than Safeway, please immediately contact us so that we may review the whole situation."

Two observations are made by Olympia about (1) the boycott and (2) the territorial restriction. There was no evidence in the record that Olympia knew of or participated in any such boycott or consulted with any other brewer about it. Indeed the testimony of Olympia's officials is to the contrary. The fact that Safeway and B.D.I. filed an antitrust suit against Burgermeister and Falstaff at this time but did not join Olympia to whom it sent a "courtesy copy" of the complaint would indicate that B.D.I. did not consider Olympia a participant. The imposition of territorial and customer restrictions by Olympia on its distributors was flatly denied by Olympia officials and some of the distributors who testified.[7]

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7. There was other evidence introduced by B.D.I. suggesting territorial restrictions. (Plaintiff's Exs. 99 & 100 in particular). Olympia officials explained this evidence by asserting that it insisted that its distributors properly "service" its accounts, i.e., see that all types of Olympia packages were on the shelves, that the beer be rotated so that stale beer would not be sold, carry out point of sale merchandising programs, etc., and that the ability of the distributor to provide such service constituted the only restraint upon his territory.

Exhibit 99 was an affidavit filed by Olympia as a co-defendant with others (including B.D.I.) in a suit brought by Thriftimart, Inc., seeking a mandatory injunction to force Olympia to sell to Thriftimart through B.D.I. Among other statements in the affidavit dated September 23, 1965, by T. L. Morgan, Finance Officer of Olympia, is one bearing on the letter correspondence of 1958.

> "10. At no time has Olympia Brewing Company entered into a conspiracy with any one or more brewers or with BDI or any other

All of the 1958 evidence, which was the basis for the charge of horizontal restraint by boycott and the vertical restraint by exchange of letters, pre-dated the four year limitation period of the Act (15 U.S.C. § 15b) which restricts plaintiff's proof to the period from September 1, 1963, to August 30, 1967. Over objection, the court admitted such 1958 evidence for the limited purpose, if the evidence did so, of illuminating the subsequent conduct of Olympia but not for the purpose of establishing liability.[8]

Much of whatever law was unsettled about territorial and customer restrictions prior to June 12, 1967, was resolved in *United*

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entity for the purpose of preventing or restricting BDI from selling Olympia Beer to Thriftimart, Inc., the Plaintiff in the above referred to suit. Furthermore, while BDI has informed Olympia Brewing Company that it will not sell Olympia Beer to any retailer other than Safeway without first obtaining the consent of Olympia Brewing Company, such consent has never been requested nor has Olympia Brewing Company ever informed or advised BDI that it cannot sell Olympia Beer to Thriftimart, Inc. or any other retail account."

8. The court admonished the jury as follows when the evidence was introduced:

"Now, regardless of how this issue may be determined, a law called the Statute of Limitations limits the period for which plaintiff B.D.I. here can claim violation of the anti-trust law and recover damages therefor to the period of four years preceding the commencement of its present lawsuit. This lawsuit was commenced on August the 30th, 1967. Thus, the preceding four years would go back only to August 30th, 1963. B.D.I., therefore, cannot rely on acts of Olympia done before August the 30th, 1963, to fix liability of Olympia for violation of the anti-trust law, even if prior to that date, that is, prior to August 30th, 1963, acts of Olympia were, we can assume, in violation of the anti-trust laws.

"B.D.I., therefore, must rely, for its purposes in this case, upon the acts of Olympia occurring after August the 30th, 1963.

"Consequently, the jurors must look only to the acts of Olympia occurring after August 1963, in determining whether Olympia violated the anti-trust law. That is, whether Olympia, in its dealings with B.D.I. during the four-year period prior to commencement of its lawsuit, was acting independently for its own business interests, as it claims, or was acting in agreement, combination or conspiracy in restraint of trade with other brewers or distributors." R.T. 707-08.

No objection was made to this admonition nor to the court's instruction in the same vein at the close of the case. R.T. 2326-28.

States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). That case involved challenged vertical restrictions as to territory and dealers. The restrictions were assertedly imposed by the manufacturer of bicycles who had two methods of distribution. One was its practice of franchising of retailers in which Schwinn retained all indicia of ownership including title, dominion and risk. The imposition of restrictions in this situation was held not to be an unreasonable restraint of trade where the facts disclosed:

> "(1) that other competitive bicycles are available to distributors and retailers in the marketplace, and there is no showing that they are not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product; (2) that Schwinn distributors and retailers handle other brands of bicycles as well as Schwinn's; (3) in the present posture of the case we cannot rule that the vertical restraints are unreasonable because of their intermixture with price fixing; and (4) we cannot disagree with the findings of the trial court that competition made necessary the challenged program; that it was justified by, and went no further than required by, competitive pressures; and that its net effect is to preserve and not to damage competition in the bicycle market." 388 U.S. at 381-82 (footnote omitted).

The rule of reason is to be applied in such a situation. As to outright sales, however,

> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act." *id.* at 382.

The rule applies not only to sales to distributors but also as to sales to retailers. *Id.* at 378.

Here the appellant's first argument is directed at a horizontal restraint. It asserts that there was concerted action among brewers which amounted to a combination or a conspiracy to boycott

B.D.I. unless and until it would come to heel and limit its sales to its primary customer, Safeway. The difficulty with appellant's position is that there was no direct evidence of such a plot in which Olympia participated. Olympia officials denied it. The situation occurred in 1958. There was little if any evidence that it continued after August 30, 1963, and into the period not barred by limitation. There was direct evidence to the contrary. The jury found against the appellant and the court refused relief notwithstanding the verdict. Much of the evidence was testimonial. We do not find it so unsubstantial that we can set aside the judgment.

Combination and conspiracy having been determined against appellant, we turn to a consideration of the exchange of correspondence in 1958. Was there contained within the text of that exchange either an explicit agreement or an implied or silent understanding between the lines as would constitute a per se violation? And if there were, did it continue from July 1958 beyond August 30, 1963, to infect the relationship between the parties during the actionable period?

In contract terms the letters do not constitute an agreement. The first two paragraphs of the letter of July 11, 1958, are explanatory only. The third and fourth paragraphs which are quoted above contain what appellants term to be the "offer" as expressed in contract terms. Yet in such terms it does not offer to buy in any amount for any price or for any length of time. It does, of course, state that B.D.I. will not sell any Olympia products to anyone other than Safeway without Olympia's prior consent and approval. It continues, however, to say that if "opportunities for a broader form of distribution should arise," B.D.I. would like to feel free to discuss them. An implication open to the jury therefore would be that the historical pattern of distribution by B.D.I. exclusively to Safeway is satisfactory and that B.D.I. has no existing better or broader form of distribution. But if one should arise, B.D.I. would like to explore it. It certainly does not intimate that its

present desire is to sell to others and that it proposes to forego that right in consideration of a counter promise from Olympia.

The Olympia reply simply states that "at the present time" Olympia would like B.D.I. to hold itself to its indicated manner of distribution, i.e. to Safeway. It does not, however, foreclose different arrangements but asks only that it be contacted so that Olympia may review the whole situation in the event of a change.

It is to be noted that the letter written by B.D.I. was unsolicited. There was no evidence of a demand or even a request by Olympia for any letter from B.D.I. There had been a complete change in the corporate ownership and the letter was an affirmation of the fact of "business as usual." It was a message of reassurance. The B.D.I. letter did not require or even request a response. The Olympia letter was equally unsolicited and equally general. Although appellants suggest that it was a contract until terminated, the language clearly shows that it was B.D.I. which reserved the option to alter its policy. Olympia only requested that B.D.I. continue its announced intention to continue the usual business practices "for the present time" and invited a discussion of a change at any time B.D.I. should wish it. There was no statement that there would be a refusal of any change which B.D.I. proposed. Failure of appellant to request a change of Olympia under these circumstances could only indicate its satisfaction with the existing arrangement and a willingness to continue under it "until opportunities for a broader form of distribution," should arise.

A gratuitous and unsolicited statement of policy or of intention which receives the concurrence of the party to whom it is addressed, does not constitute a contract. *Goetz v. State Farm Mutual Automobile Insurance Co.*, 31 Wis.2d 267, 142 N.W.2d 804, 807 (1966); 1 Williston on Contracts (3d ed., Jaeger) § 1A, p. 5. Or as it is sometimes stated, since an offer must be a promise, a mere expression of intention or general willingness to do something on the happening of a particular event or in return for

something to be received does not amount to an offer. *Lahaina-Maui Corp. v. Tay Tet Hew,* 362 F.2d 419 (9th Cir. 1966); *Winand v. Case,* 154 F. Supp. 529 (D.Md. 1957); *Parrish v. General Motors Corp.,* 137 So. 2d 255 (Fla. Dist. Ct. App. 1962); 1 Williston, *id.,* § 26, p. 59. In *Winand* as here reliance was upon a letter dated June 9, 1944, and a response thereto. Paragraph 3 of the letter began:

> "3. *It will be desirable to us* that your present president, Mr. Henry A. Brehm, become Chairman of the Board and be paid a salary of $2,500 per year so long as the operations justify; . . . *it is also our desire to have both William Winant* [sic] *and George Blome remain active in the business indefinitely, and it is our intention that, if they show the ability and application required to make the business successful under reasonable direction of our organization, they shall have a reasonable amount of the new common stock,* which will be issued exclusively to members of our organization . . . ." 154 F. Supp. at 533. (Emphasis in the original opinion).

Winand sued to recover damages for breach of a written contract to employ him for life. The court denied relief saying that "at the most" the plaintiff had a contract of employment for an indefinite period, terminable at will. In *Winand* the proposals were considerably more formalized than the exchange of letters here. The court said:

> "The aforegoing conclusions aside, the plaintiff still, as a matter of law, could not recover. The wording of the letter of June 9, 1944, and in particular the wording of paragraph 3 therein, are subject to the criticism advanced by Judge Parker in Lucas v. Federal Reserve Bank of Richmond, 4 Cir., 1932, 59 F.2d 617, 619:
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> 'It is clear that the first cause of action states no ground of relief either in contract or in tort. The allegation that the Reserve Bank promised to "extend such additional accommodations in the way of discounts as would be necessary to meet the additional burden assumed" sets forth none of the essential terms of a contract. It does not show

> the amount of credit to be extended, *the period of the credit,* the *amount of kind of security* to be deposited as collateral, or *the interest to be paid.* The court cannot see by reading it any definite agreement which the law could enforce. In the language of Mr. Justice Holmes, "On the face of it, it does not import a legally binding promise, but rather a hopeful encouragement, sounding only in prophecy." Hall v. First Nat. Bank of Chelsea, 173 Mass. 16, 53 N.E. 154, 155, 44 L.R.A. 319, 73 Am.St. Rep. 255. It is well settled that such a vague promise does not constitute a binding and enforceable contract." (Emphasis supplied). *Winand v. Case, supra,* 154 F. Supp at 541-42.

Judged again by standards of contract law as appellant proposes, it is plain that where the promisor retains the unlimited right to decide later the nature or extent of his performance the promise is illusory. *Eastern Transportation Co. v. Blue Ridge Coal Corp.,* 159 F.2d 642 (2d Cir. 1947).

Even though Section 1 of the Sherman Act speaks in terms of "contract", it appears clear that appellant, in the light of *Schwinn,* attempts to prove more than is required. For from *Schwinn,* we apparently learn that Section 1 violations are not judged by formal contract principles. Rather the Court says that once the manufacturer has parted with title and risk, any "effort" to restrict territory within which the purchaser may re-sell or persons to whom the product may be transferred is a per se violation. Accepting the language of *Schwinn* read as narrowly as appellant could urge upon us we still cannot find that the necessary vertical restraint has been imposed. With respect to any conspiracy or combination to impose vertical territorial or customer restrictions, that problem has been determined by the jury which found no such restrictions. The trial judge has re-examined the matter on a motion for judgment n.o.v. and has determined that the verdict "is not so inadequately supported by the evidence as to require

a new trial" and has denied the motion. We cannot say that those two judgmental decisions on conflicting evidence should be overturned. Nor do we find from an examination of the instructions and rulings that there has been any erroneous application of principles of law as in *Albrecht, supra.* So we return again to the question as to whether or not the letter exchange constitutes an effort at restraint. We have noted that it does not constitute a contract. Likewise it would support a jury finding that it does not constitute an "effort" to impose territorial or customer restrictions. As of 1958 the responsive letter of Olympia is in terms of "we would desire" that you hold yourself to your indicated commitment. It does not say "we insist" or that "we must require" or that "we demand." And, of course, it invites a review of the situation should, as B.D.I. suggests in its opening letter, "circumstances change" with new opportunities opening which would stimulate a desire for B.D.I. to "discuss them with you." The proposal which the new ownership of B.D.I. made in 1958 was one which left the initiative up to B.D.I. to suggest opportunities for a broader form of distribution for B.D.I. Assuming arguendo that it was a continuing contract from day to day, or for a reasonable period, there is no evidence that B.D.I. ever requested or even suggested a policy change. On the contrary, there was evidence that other distributors did sell outside of their service areas and Olympia did nothing about it. R.T. 1515-17. There is also evidence that other distributors could sell at prices which varied from the suggested prices and Olympia did not complain. R.T. 1568. The jury was justified in believing that B.D.I. was under no greater restraint. The 1958 evidence was outside the limitation period for liability to be imposed and the court so instructed with no objection from either side. The liability period began on September 1, 1963. There were no requests by B.D.I. for a discussion of different arrangements after 1963. Failure to request any change under

these circumstances would justify an inference of their satisfaction with the existing arrangement.[9]

The restraint upon B.D.I. in 1958, by the terms of Olympia's letter was "for the present." Beginning September 1963 both the method of doing business by Olympia, its instructions to sales people by sales executives and its official company policy as set out by its counsel, would indicate no restraint upon B.D.I. If any restraint was felt, it was self imposed. *Id.*

THE FAIR TRADE PROGRAM OF OLYMPIA

B.D.I. notified Olympia by letter dated August 7, 1967, that it intended to broaden its base of distribution by re-selling to certain other customers. Ex. 12. The announcement indicated that the additional customers to whom sales would be made were customers of a type who would themselves handle Olympia products through a central warehouse system and did not include any small retail accounts. The response of Olympia to the August 7, 1967, announcement was that "it is the position of our company that every distributor has a right to sell to customers of his own selection." Ex. 13.

However the announcement did compound a concern which Olympia already had with B.D.I. This was its concern with the typical method of warehouse distribution to chain outlets typified by B.D.I., which Olympia believed resulted in loss of quality control. R.T. 186-91; 1069; 1310. It was the judgment of the executives of Olympia that there were three business decisions that

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9. In July 1966, Sherman Huffine, vice-president and legal counsel for Olympia sent a memo to Harry Moore, district manager for the Los Angeles area in which he instructed Mr. Moore to express company policy as follows:

> "Olympia Brewing Company cannot and does not tell its distributors to whom they should sell, that we do not interfere with the sales procedures of our distributors, that they have free choice of customers and that our company sells only to its distributors, who are licensed wholesalers.

could be made in the light of the announcement by B.D.I. First, to do nothing and run the risk of poor handling and damage to company image with the public; second, to cease deliveries; and, third, to institute a fair trade program with wholesale distributors which management felt would deter the proliferation of warehouse distribution. The president of the company chose the latter alternative.

"Fair trade," of course, simply means an agreement by which the manufacturer fixes the price at which the wholesaler or retailer, as the case may be, can legally re-sell the product. Such an agreement, if otherwise lawful, binds not only the signers but the non-signers of the fair trade contract.

The anathema of price fixing underlying the Sherman Act has been softened somewhat by the fair trade statutes. Congress by enacting the Miller-Tydings Act and, later, the McGuire Act has permitted price fixing so long as it is subject to the limitations of those amendments. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Bausch & Lomb Optical* Co., 321 U.S. 707 (1944). Those limitations permit price fixing only where:

1. The commodity or label bears the trademark, name or brand of the producer or distributor.

2. The articles fair-traded are in free and open competition with other commodities of the same general class produced or distributed by others; and

3. The fair trade agreements are lawful in the state where the resale is to be made.

Overall is still the prescription that whatever may be the rights of the individual producer to enter into vertical agreements with those who distribute or sell his goods to maintain their resale price, he may not enter into any agreement or combination with other producers to utilize fair trade agreements to fix prices and thus violate the basic purpose of the Sherman Act. *United States v.*

Frankfort Distilleries, 324 U.S. 293 (1945). In other words, fair trade agreements may not be used as a subterfuge to accomplish purposes otherwise illegal under the antitrust laws.

There does not appear to be any argument but what the first three conditions for fair trading are met here. The product is clearly identified under the label of Olympia Brewing Company as an Olympia product; there are numerous national and regional beers competing in the same market, some of them out-selling Olympia; and finally, fair trade agreements are lawful in California and were at the dates in question. Cal. Bus. & Prof. Code §§ 23,004, 24,749; 24,750[10] (West Supp.). B.D.I. does contend, however, that a combination existed which made fair trade agreements unlawful. This combination, it is asserted, was one among Olympia's wholesalers and their trade association to establish a market-wide fair trade program and thus indirectly force B.D.I. out of its central warehouse delivery system. Whether there was such a combination as would make unlawful the otherwise lawful fair trade agreements was a question for the jury on disputed facts. The court gave careful instructions on the entire subject. Those instructions met with the approval of all counsel. The verdict of the jury and the judgment of the court supporting appellee's position on this point is supported by very substantial evidence.

Appellant also argued the theory that a violation of Section 1 was complete when B.D.I. acquiesced in the resale price maintenance program initiated by Olympia. The restraint that existed upon B.D.I. was one allowed by the fair trade law. And the previously discussed evidence of any other unlawful purpose, restricting B.D.I.'s ability to compete, is clearly contradicted. Thus, no violation of the Act is established.

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10. *ABC Distributing Co. v. Distillers Distributing Co.,* 154 Cal.App. 2d 175, 316 P.2d 71 (1957).

OLYMPIA'S SEPTEMBER 1967 REFUSAL TO DEAL WITH B.D.I.

The final argument advanced by B.D.I. in support of its substantive position that Olympia violated Section 1 of the Sherman Act is predicated upon Olympia's refusal to deal further with B.D.I. in September 1967. B.D.I. contends that this refusal to deal was a violation of the antitrust laws because it was an additional act in perpetration of an unlawful conspiracy and combination to restrict B.D.I.'s sales to customers other than Safeway. Reliance is placed upon *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) in support of this legal proposition. We fail to find the same comfort in *Albrecht* for B.D.I.'s position on these facts that it does.

Nonetheless the question of the wrongful termination vel non of B.D.I. by Olympia was submitted to the jury upon instructions to which no objection was interposed. (Except for the refusal to give 31 A which will be commented upon *infra*). Those instructions submitted to the jury the plaintiff's theory of the case and permitted a finding for the plaintiff if the jury found the disputed facts in its favor. The jury did not find for B.D.I. We agree with the trial court that there was ample evidence to support that verdict.

The cases appear to clearly establish that a single manufacturer can select his own customers and sell to these and not to any others, at least where there are other and equivalent brands readily available. *United States v. Arnold, Schwinn & Co., supra,* 388 U.S. at 376; *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918, 921 (9th Cir.), *cert. denied,* 391 U.S. 916 (1968).

> "In the absence of any purpose to create or maintain a monopoly, the [Sherman] Act does not restrict the long recognized right of trader or manufacturer engaged in an

entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., supra,* 250 U.S. at 307.

When B.D.I. was first named as a distributor, it was made very plain and in writing that there was no contract for any term. The arrangement was one strictly on an order-by-order basis terminable at will by either party.[11] B.D.I.'s officers admitted at the trial that B.D.I. had no contract with Olympia and they recognized the relationship for what it was. [Mr. C. H. Jones, president of B.D.I., R.T. 700; Mr. R. T. Girard, chairman of the board, R.T. 2068-69).

The court, however, instructed the jury that although there was no contract between the parties, and although they were on an order-by-order basis, a termination may be unlawful if done by the brewer as part of and pursuant to an agreement, combination or conspiracy in restraint of trade or commerce within the meaning of the antitrust laws. R.T. 2330. This was appellant's theory. The jury found against appellant.

The appellant complains that the refusal of the court to give its requested instruction No. 31 is reversible error. We do not think so. The substance of 31 A was more than adequately covered by the court's instruction. R.T. 2328-70.

The appellant also urges that the court's refusal of its proposed instruction No. 45 constituted reversible error. The instruction had to do with the lawfulness of fair trade agreements. The jury was instructed at length concerning fair trade agreements. We find nothing in the proposed instruction No. 45 which would have added to that which was already given.

ADMISSION OF IMPROPER EVIDENCE

Appellant prior to trial filed a motion for a rule excluding evidence.

"Plaintiff moves the court for a ruling that the undisputed facts establish that the restraints imposed by Olympia and its

11. See footnote 1, *supra.*

distributors constituted per se violations of the Sherman Act and that evidence of reasonableness or other justification for such restraints will be excluded."

The motion was based upon depositions of corporate officers certain excerpts from which were attached.

We have examined the reporter's transcript to read some of the evidence which appellant in its brief points out as being objectionable within the motion. Yet no objection was interposed by appellant's counsel to its introduction and so far as we have been able to learn, no motion to strike was made. Certainly counsel cannot expect the trial court to *sua sponte* sift the evidence as it comes in to see whether it is within the parameter of appellant's motion, even should we consider, *arguendo,* that it was meritorious.

We do not believe that the point made by appellant is well taken.

DAMAGES AND INJUNCTION

Considerable evidence was introduced on the question of damages after evidence of liability had been completed. The jury was fully instructed on the question of damages. Both parties submitted their proposals. No objection was made to those instructions as given and no objection raised as to any proffered instruction refused. The jury's verdict was for the defendant.

The injunctive relief sought seeks to enjoin each of the violations which B.D.I. has asserted and the jury has found not to exist. The judgment based on that verdict being affirmed, the prayer for injunctive relief fails.

The judgment is affirmed.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1661

BEVERAGE DISTRIBUTORS, INC., a corporation,
Petitioner,

vs.

OLYMPIA BREWING CO., a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the United States Court of Appeals, entered March 1, 1971 (App. B of Petition) is not yet reported. The Memorandum of Decision of the United States District Court for the Northern District of California, entered December 22, 1969 (App. B of Petition) is unreported. The Order of the Court of Appeals, dated April 6, 1971, denying petitioner's petition for rehearing and suggestion for rehearing in banc, is attached hereto as Appendix A.

Jurisdiction.

The jurisdictional grounds are set out in the petition.

Questions Presented.

1. Whether this Court should review judgment entered on a jury verdict, when there is substantial evidence in support thereof and no misapplication of law.

2. Whether a beer manufacturer may institute a policy of wholesale fair trade, pursuant to a valid state statute authorizing such a policy, when done independently and not in furtherance of any combination or conspiracy in restraint of trade.

3. Whether a beer manufacturer may cease doing business with a distributor with whom its relationship is order-to-order, terminable at will, when it does so independently and not in furtherance of any combination or conspiracy in restraint of trade.

Statutes Involved.

The pertinent provisions of the Sherman Act (§1, 15 U.S.C. §1), the Clayton Act (§§4 and 16, 15 U.S.C. §§13 and 26) and the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code §§24749, 24750) are set out as Appendix A of the Petition. No issue was presented to the district court or the Court of Appeals respecting Section 2 of the Sherman Act (15 U.S.C. §2) which is also appended to the Petition.

Statement of the Case.

This litigation concerns the alleged involvement of respondent Olympia Brewing Company[1] in a combination or conspiracy in violation of Section 1 of the Sherman Act. The combination or conspiracy which petitioner set out to prove, and submitted to the jury,

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[1]Consistent with the style adopted in the petition and throughout the proceedings below, this brief will refer to petitioner as "BDI" and to respondent as "Olympia".

was between Olympia and other manufacturers of beer products or their trade association, and between Olympia and wholesalers of beer in California or their trade association. Its purpose or effect was said to be: restricting the territories within which, or the customers to whom, Olympia Beer could be resold; fixing and maintaining the price of beer; preventing expansion of the central warehouse method of beer distribution; fair trading the wholesale price of Olympia Beer; and declining to fill further orders from BDI—all aimed at preventing BDI from selling Olympia Beer to any customer other than Safeway Stores, Inc.

On fifteen trial days, commencing November 3, 1969, the jury heard 23 witnesses, saw 258 exhibits, and listened to argument and instruction for three days. On December 11 the case was submitted and the same day the jury returned a verdict for Olympia.

By customary post-trial motion, BDI sought entry of a judgment notwithstanding the verdict, and entry of a permanent injunction.[2] Noting that the jury had resolved all significant issues from conflicting evidence in Olympia's favor, the district court denied BDI's motion and entered judgment for Olympia (App. B of Petition, p. 5).

BDI's appeal to the Ninth Circuit was essentially factual. The Court of Appeals observed its duty to reverse in the face of "undisputed facts" or the application of an erroneous legal standard in the court below (App. B of Petition, p. 10), found neither in the voluminous record before it, repeatedly noted the conflict in the evidence (App. B of Petition, pp. 9, 16, 20,

[2]The issues of equitable relief were reserved by the district court for decision until after the jury had reached its verdict, in conformity with a practice approved by this Court. *Beacon Theaters v. Westover*, 359 U.S. 500 (1959).

23, 24 and 26) and the failure of BDI to object to the trial instructions (App. B of Petition, pp. 9, 20, 23, 24 and 26) and affirmed. BDI's application for rehearing in banc was likewise denied, no judge deeming the case appropriate for rehearing in banc (App. A hereto).

The salient facts established at trial are these:

The relationship between Olympia and BDI began when BDI was appointed an Olympia Beer distributor by letter of June 2, 1953 [Ex. S]. The relationship thereby created was non-contractual [R.T. 700; R.T. 2068-2069], expressly stated to be without value, order-to-order and terminable at the will of either party. Olympia also informed BDI [Exs. S and U]—and BDI acknowledged [Exs. T and V; R.T. 689-701]—that as a matter of policy the Olympia Brewing Company regarded the distributorship relationship as a matter of personal trust and confidence.

Neither the letter of appointment nor any other communication between Olympia and BDI set forth any restriction on the territory to be served or the customers to whom BDI could distribute Olympia Beer.

BDI always sold Olympia Beer in every area where it was licensed by the State of California to do so. Until August of 1967, however, BDI sold Olympia Beer only to its former parent and "principal customer" [R.T. 1300], Safeway Stores, Inc., whom it served as exclusive supplier [R.T. 286]. When BDI determined to change this historic pattern, it announced a plan of selective expansion by which it proposed to favor some, but not all, of its retail customers [Ex. 12]. Olympia unequivocally repeated to BDI its position that "every distributor has a right to sell to customers of his own selection." [Ex. 13].

Olympia entered into fair trade agreements with two of its California wholesalers, effective August 10, 1967 [Exs. 15 and 16]. To do so was consistent with the declared policy of the State of California with regard to distribution of alcoholic beverages and was pursuant to statutory authorization of the California Business & Professions Code [Calif. Bus. & Prof. Code §§24749, 24750].

BDI thereafter submitted a number of orders for the purchase of Olympia Beer. All orders which were not cancelled by BDI were filled by Olympia until August 30, when this lawsuit was filed by BDI, charging Olympia with criminal violations of the law and imputing to it hostile motives in dealing with BDI [Ex. FF, R.T. 682, 1367-1368]. Upon receiving the first set of orders from BDI after service of suit, Olympia executives concluded that it would be imprudent to entrust the marketing of a perishable product to a distributor in whom there no longer reposed mutual respect or confidence [R.T. 251, 266-269].

From the general verdict in Olympia's favor, it must be concluded the jury believed that Olympia was not a member of or party to any combination or conspiracy in restraint of trade; that Olympia acted independently for its own business reasons when it decided to institute fair trade in California at the wholesale level; that Olympia likewise acted independently when it decided, after this suit was commenced, not to accept further orders from BDI; that BDI was not restricted or limited in the conduct of its business by any act or attitude of Olympia; and that BDI suffered no injury to its business or property by reason of any act of Olympia.[3]

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[3]Inasmuch as the case went to the jury on the issue of damages as well as liability, the general verdict imports a finding in Olympia's favor on both issues. See *Bank of America v. Hayden*, 231 F. 2d 595 (9th Cir. 1956).

ARGUMENT.

This is a common or garden variety case of unproved conspiracy. Without serious effort to meet any of the standards of Rule 19, BDI's petition asks this Court to review a uniquely factual controversy, from which no rule of general application can be derived.

1. *The petition poses no conflict between the judgment of the Ninth Circuit and that of any other Court of Appeals.* It could not: the Ninth Circuit decided no question of substantive law. What the Court of Appeals decided, in the exercise of its power as an appellate court, was (i) that the jury verdict, and judgment thereon, were supported by substantial evidence; (ii) that there were no undisputed facts which justified reversal [noting *Albrecht v. The Herald Company,* 390 U.S. 145 (1968)]; and (iii) that the verdict and judgment were not premised on an erroneous legal standard [noting *United States v. Parke, Davis & Co.,* 362 U.S. 29, 44 (1960)] (App. A of Petition, p. 10).

2. *The petition poses no question of federal law, important or otherwise, which has not been settled by this Court.* It could not: BDI does not suggest that the facts of this case present for decision any substantive matter on which this Court has not spoken before. The most recent views of this Court on the issues litigated were *all* announced *before* trial, [*E.g., United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967); *Albrecht v. The Herald Company, supra*] and were considered in framing the trial instructions. [See *infra* at p. 7].

3. *The petition poses no federal question decided by the Ninth Circuit in any way in conflict with applicable decisions of this Court.* It could not: the Ninth Circuit took full account of the latest opinions of this Court on

each aspect of Section 1 put in issue by BDI. The trial court did likewise, for its instructions covered all of BDI's theories of liability, and as to each incorporated the rules of law most recently stated by this Court, *e.g.*:

combination or conspiracy: *Albrecht v. The Herald Company, supra; United States v. General Motors Corp.*, 384 U.S. 127 (1966) [Instructions, R.T. 2319-2325, 2329-2330, 2371, 2377-2379; Ninth Circuit Opinion, App. B of Petition, pp. 10, 20, 24];

territorial or customer restrictions: *United States v. Arnold, Schwinn & Co., supra* [Instructions, R.T. 2371-2372; Ninth Circuit Opinion, App. B of Petition, pp. 8, 11-21];

fair trade: *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944) [Instructions, R.T. 2372-2376; Ninth Circuit Opinion, App. B of Petition, pp. 21-23];

termination: *Albrecht v. The Herald Company, supra*; *United States v. Arnold, Schwinn & Co., supra; United States v. Colgate & Co.*, 250 U.S. 300 (1919) [Instructions, R.T. 2322-2323, 2329-2330, 2371; Ninth Circuit Opinion, App. B of Petition, pp. 24-25];

unlawful purpose: *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Frankfort Distilleries, supra* [Instructions, R.T. 2330-2371, 2376; Ninth Circuit Opinion, App. B of Petition, pp. 23-24].

Fully aware of those decisions, BDI took no exception to any of the instructions given by the trial court.[4]

In short, the only justification BDI offers to induce this Court to assume the role of trier of fact is the assertion that the record below contained "undisputed and conclusive evidence overlooked or disregarded by the Courts" (Petition, p. 7)—an egregious misstatement of the record on appeal. The Ninth Circuit was at pains to catalogue the conflicting evidence on each material issue of fact; and specifically directed its attention to those items of documentary proof offered by petitioner, which BDI now adjures were "totally ignored." (Petition, p. 9).

On the issue of territorial or customer restriction, BDI invites this Court's attention to 3 of some 210 exhibits it offered at trial. Each of these three was placed before the jury in the closing argument of BDI's trial counsel. [R.T. 2424-2426, 2450-2452]. Each was examined by the Ninth Circuit.[5] Indeed, Exhibit 100[6]

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[4]BDI did object to the refusal of the trial court to give two minor, noncritical instructions, the substance of which was, as the Court of Appeals noted, adequately covered by the instructions given (App. B of Petition, p. 25).

[5]Exs. 51 and 52: App. B of Petition, pp. 12, 13, 16-21;
Ex. 100: App. B of Petition, p. 13, n. 7.

[6]Although BDI now urges the "chilling effect" of Exhibit 100 on BDI's efforts to expand sales, it offered no evidence at trial that the existence or contents of Exhibit 100 was known to any of its operating personnel. If BDI had "notice" of anything as a result of that memorandum, it was simply because BDI was party to a suit in which the memorandum was filed and a copy of it was served on its attorney of record, Willard Johnston, then a shareholder of BDI and now owner of 60% of BDI's stock [R.T. 579], who is counsel of record here. Although Mr. Johnston was present throughout the trial, BDI chose not to call him. The jury was justified in inferring that his sworn testimony would not have supported the argument made in closing argument and repeated in the petition.

was the specific basis on which petitioner sought rehearing before the Ninth Circuit.[7]

As the Court of Appeals repeatedly observed, these items of proof were controverted by extensive evidence, including: testimony of Olympia's distributors that they were free to sell wherever and to whomever they chose [R.T. 1457, 1521, 1555, 1595, 1373-1374] and did so without comment from Olympia [R.T. 1454-1455, 1426-1427, 1428-1431, 1516-1521]; testimony of Olympia's officers, district managers and sales personnel that they did not limit Olympia's distributors in their sales activities [R.T. 1150-1168, 1306, 1341, 1425], but rather encouraged them to undertake the widest possible distribution [R.T. 99, 189] and to service all possible accounts [R.T. 1150]; and proof that BDI sold Olympia Beer throughout the State of California and, presumably, to whom it wished.[8] Thus there is no analogy to this Court's action in *Albrecht*, upon which BDI curiously relies. In *Albrecht* the "undisputed facts" were just that: non-testimonial and non-controverted by the defendant. By contrast, every material element of BDI's proof in the trial court was vigorously disputed through testimony on the stand as well as documentary evidence from which the jury was free to draw contrary inferences in Olympia's favor.

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[7]Order denying rehearing, App. A hereto; BDI's Petition for Rehearing is attached hereto as Appendix B. Exhibit 100 is discussed at pp. 2, 3 and 4.

[8]As noted above, BDI sold Olympia Beer to Safeway out of historic reverence for its quondam parent and "principal customer" [R.T. 285-286, 1240-1300. Ex. FE]. Never throughout its tenure did BDI manifest to Olympia any notion of expanding its sales [R.T. 1301-1304]; in fact, it turned down opportunities to do so without telling Olympia of the opportunity or BDI's decision. [R.T. 497, 1041].

On the issue of fair trade, BDI apparently complains that the jury evaluated Olympia's "purpose" differently than petitioner would wish. Yet it concedes the Ninth Circuit adopted BDI's own version of the applicable legal standard (App. B of Petition, p. 23) in appraising the jury verdict (Petition, p. 10). We are at a loss to see what is left of a Section 1 fair trade case without a conspiracy. *Cf. First National Bank v. Cities Service Co.,* 391 U.S. 253 (1968).

The issue of termination is a non-issue at best. Olympia is perfectly free to select those with whom it will deal so long as it does so independently. [*United States v. Colgate,* 250 U.S. 300, 307 (1919); *United States v. Arnold, Schwinn & Co.,* 388 U.S. at 376]. Every court which has considered the matter agrees that a manufacturer, acting alone, may terminate a distributor or substitute one for another.[9]

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[9]*See, e.g., Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.,* 416 F. 2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Scanlan v. Anheuser-Busch,* 388 F. 2d 918 (9th Cir.), *cert. denied,* 391 U.S. 916 (1968); *Perryton Wholesale, Inc. v. Pioneer Distributing Co.,* 353 F. 2d 618 (10th Cir. 1965), *cert. denied* 383 U.S. 945 (1966); *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F. 2d 1 (9th Cir. 1963); *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F. 2d 283 (6th Cir.), *cert. denied* 375 U.S. 922 (1963); *B&B Oil & Chemical Co. v. Franklin Oil Corp.,* 1969 Tr. Cas. ¶72,737 (E.D. Mich. 1968); *Industrial Building Materials, Inc. v. Interchemical Corp.,* 278 F. Supp. 938 (C.D. Calif. 1967); *Schwing Motor Co. v. Hudson Sales Corp.,* 138 F. Supp. 899 (D. Md.), aff'd, 239 F. 2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F. 2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).

BDI's citation to *Albrecht* in this context is plainly wrong. Neither *Albrecht* nor any other case[10] holds that termination of a dealer is made *unlawful* simply because it follows commencement of litigation.[11] Such a holding would lead to the palpably ridiculous result that the first side to the clerk's office wins. As the Ninth Circuit noted (App. B to Petition, p. 24), the jury was amply instructed, without objection from BDI, in accord with *Albrecht*. The resultant verdict simply means the jury viewed Olympia's decision to decline BDI's orders as unilaterally and lawfully motivated.

Conclusion.

BDI's petition is devoid of any reason why this Court should concern itself with the issues of fact presented. No new question of law is offered for consideration; no conflict in legal standards between the Ninth Circut and other circuits is suggested; no misapplication of law is claimed; no issue of any consequence, beyond the factual dispute already thrice-resolved in Olympia's favor, is raised.

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[10]The decisions cited by BDI, *e.g., Bergen Drug Co. v. Parke, Davis & Co.*, 307 F. 2d 725 (3rd Cir. 1962); *F. K. Weingartner v. Union Oil Co.*, 1966 Tr. Cas. ¶71,757 (N.D. Calif. 1965); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867 (2d Cir. 1962), all deal with the availability of an injunction pendente lite and are inapposite on this point since they do not establish any rule applicable to liability.

[11]BDI typically mischaracterizes the records: Olympia did not terminate BDI because fair trade didn't work [*supra*, p. 5]; nor did Olympia ever urge that commencement of litigation "justified" a termination otherwise unlawful.

As determined by the district court and the Ninth Circuit, the evidence reasonably supports the determination of fact made by the jury and the judgment of the court thereon. [*Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944)]. It is respectfully submitted that a writ should not issue to call up and review the judgment of the Court of Appeals for the Ninth Circuit.

Dated: May 14, 1971.

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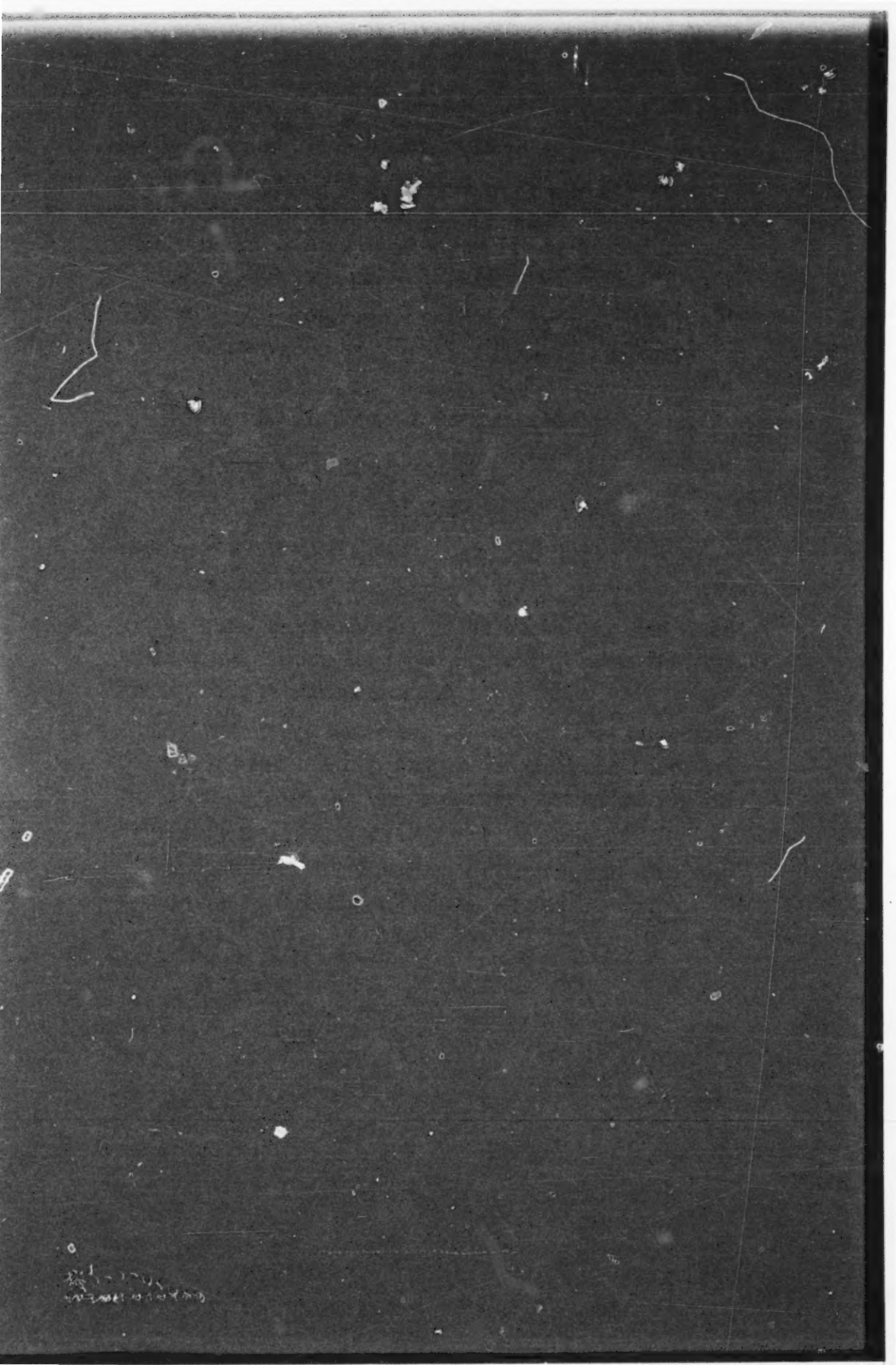

Appendix A

United States Court of Appeals,
for the Ninth Circuit

No. 25,463

BEVERAGE DISTRIBUTORS, INC., a corporation,
Plaintiff-Appellant,
vs.
OLYMPIA BREWING CO., a corporation,
Defendant-Appellee.

ORDER

Before: BROWNING, WRIGHT and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix B

United States Court of Appeals,
for the Ninth Circuit

No. 25,463

BEVERAGE DISTRIBUTORS, INC., a corporation,
Appellant,

vs.

OLYMPIA BREWING CO., a corporation,
Appellee.

On Appeal From the United States District Court, for the Northern District of California.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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A. Introduction.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Appellant Beverage Distributors, Inc. respectfully petitions for a rehearing, following this Court's decision of March 1, 1971, on the following grounds:

1. In holding that any restraint upon BDI prior to 1967 was "self imposed" (Opinion p. 14) this Court failed to discuss the effect of Exhibit 100, which is a clear and undisputed admission that Olympia has assumed an obligation to its other distributors to protect them from competition by BDI in their franchise territories.

2. This Court's opinion is in conflict with long accepted doctrine by its failure to hold that Olympia's

purpose in entering into fair trade contracts to "deter the proliferation of warehouse distribution" by BDI constitutes a violation of anti-trust law.

B. Argument.

1—In holding that any restraint upon BDI prior to 1967 was "self-imposed" (Opinion p. 14) this Court failed to discuss the effect of Exhibit 100[1] which is a clear and undisputed admission that Olympia has assumed an obligation to its other distributors to protect them from competition by BDI in their franchise territories.

We respectfully suggest that the deference due a jury verdict cannot sustain this Court's holding that there was no restraint imposed by Olympia upon BDI prior to 1967 (Opinion p. 14). The Court has relied (Opinion pp. 13-14) upon precatory words in Olympia's letter of July 11, 1958 (Ex. 52) to hold that "it would support a jury finding that it does not constitute an 'effort' to impose territorial or customer restrictions." The Court further relies upon evidence that other distributors had sold outside their areas or at prices varying from those suggested by Olympia as a justification for the jury to believe that BDI was under no greater restraint (Opinion p. 14). Yet Exhibit 100 (copy attached as appendix) constitutes an unequivocal admission that Olympia was even then imposing a restraint against BDI for the purpose of protecting "franchise territories" of Olympia's distributors from "encroachment" by BDI, which Olympia admitted would involve

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[1]While the opinion refers to Ex. 100 (Fn. 7, page 8), the text could not properly refer to Ex. 100, since that exhibit was never mentioned in any testimony or other evidence submitted by Olympia.

"undercutting Olympia's obligation to its territorial franchises" (Ex. 100, Appendix pp. 2-3). As the Court will recall, although in the hearing before this Court we challenged counsel for Olympia to explain away the significance of this admission, he chose not to mention it. Nor did counsel for Olympia ever mention this exhibit in argument at the trial. Furthermore, no Olympia witness ever testified concerning it. Exhibit 100 therefore must be accepted as undisputed. We submit that Exhibit 100 alone compels this Court to hold that there was no substantial evidence to support a jury finding of no effort by Olympia to impose territorial or customer restrictions upon BDI. Exhibit 100 must be accepted as a statement of Olympia's anticompetitive purpose prior to 1967 and that motivating the 1967 fair trade program and subsequent refusal to deal as well.

2—This Court's opinion is in conflict with long accepted doctrine by its failure to hold that Olympia's purpose in entering into fair trade contracts to "deter the proliferation of warehouse distribution" by BDI constitutes a violation of anti-trust law.

This Court's opinion recognizes that Olympia admittedly entered into fair trade contracts with two distributors in 1967 to "deter the proliferation of warehouse distribution" by BDI (Opinion p. 15).[2] The Court also notes, apparently as constituting a justification for the combination to deter warehouse distribution, Olympia's professed concern that warehouse distribution resulted in loss of quality control (*ibid.*). Yet

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[2]The opinion erroneously states that Olympia adopted and put in operation its fair trade program in September of 1967 (Opinion p. 3). The program was adopted on the day Olympia received BDI's announcement that it intended to compete for customers of other distributors (R.T. pp. 179-184).

under well accepted anti-trust doctrine, such a *per se* restriction upon competition as the action by contract between Olympia and two distributors to "deter' a method of conducting business cannot be excused as justified by sound economic or business reasons. In *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed. 2d 1246 (1967), the Court rejected Schwinn's defense that the challenged distribution system was adopted to enable it and small independent merchants to compete more effectively against Sears, Ward and other mass merchandisers (388 U.S. at 374-377; 87 S.Ct. 1863-1864). In *United States v. General Motors,* 384 U.S. 127, 142, 86 S.Ct. 1321, 1329, 16 L.Ed 2d 415 (1966) the Court rejected the excuse that a distribution program was adopted to combat discount houses. In *Fashon Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, 467, 61 S.Ct. 703, 708, 85 L.Ed. 949 (1941) a purpose to protect the manufacturer against style pirates was held no defense. We submit that Olympia's purpose to deter warehouse distribution constitutes no better justification.

C. Suggestion for hearing in banc.

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellant respectfully suggests that a rehearing in banc be ordered. We believe that the exceptional importance of this case to California's beer distribution industry—involving the very existence of central warehousing—justifies such action. (See Ex. 147, R.T. pp. 929-931; Ex. 84, 85, 86, 87, 146, and R.T. pp. 945-948 concerning the long term campaign of the California Beer Wholesalers Association to eliminate BDI.) The importance of implementing the law against customer and territorial restrictions upon dis-

tributors is emphasized by the Federal Trade Commission's current extensive efforts to eliminate such restrictions. See, *e.g., Erie Foundry Co.*, CCH Trade Reg. Reports Par. 19, 481; *Adolph Coors Co.*, CCH Trade Reg. Reports Par. 19, 454; *Crush International Ltd.*, CCH Trade Reg. Reports Par. 19, 443.

Dated: March 15, 1971.

Respectfully submitted,

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Willard S. Johnston
Ackerman, Johnston, Norberg
& Parkinson
By Benjamin H. Parkinson
Counsel for Appellant
Beverage Distributors, Inc.